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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1974

No. 73-5772

ANTHONY PASQUALL FARETTA, *Petitioner,*

vs.

STATE OF CALIFORNIA, *Respondent.*

On Writ of Certiorari to the California Court of Appeal Second Appellate District

BRIEF FOR AMICUS CURIAE JOHN E. THORNE

CONSENT

The undersigned, John E. Thorne, is a member of the Bar of the State of California and a member of the Bar before this Honorable Supreme Court of the United States. As such I hereby represent, under penalty of perjury, that I have permission from the attorney for Petitioner and the attorney for Respondent to file this Amicus Brief.

OPENING STATEMENT

It is believed that to simply repeat the language of Petitioner's Opening Brief under the sections entitled

"Opinions Below", "Jurisdiction", "Constitutional and Statutory Provisions Involved", "Question Presented", and "Statement" would be redundant and a waste of the Court's time. Therefore those sections from Petitioner's brief are hereby adopted in their entirety and incorporated herein by reference. This brief will be limited to a presentation of a summary of the argument and the argument itself.

SUMMARY OF ARGUMENT

I

> "If I'm going to be railroaded to the gas chamber at least let me be the engineer."—Ruchell Magee

The above quote from Mr. Ruchell Magee, a Defendant presently awaiting trial in California, touches the very heart of the first portion of the argument in this brief, namely whether or not each of us in this country has the right to defend ourselves when the rest of the people have brought a charge against us in a criminal proceeding. Involved is the interpretation of language found in the Sixth Amendment to the Constitution of the United States giving those accused in criminal prosecutions the right ". . . to have the assistance of counsel for his defense." The due process clauses of the Fifth and Fourteenth Amendments of the United States Constitution, as well as Article I, Section 13 of the California Constitution, and California Penal Code Sections 686,

859, and 987 are also involved, the California Constitution sections and the Penal Code sections being similar in intent to the Sixth Amendment of the United States Constitution.

The language interpretation question asks whether the Constitution in giving us the right to ". . . assistance of counsel . . ." carries with it the right to reject assistance of counsel and defend ourselves. The first part of the Argument answers this question affirmatively, suggesting that if the word freedom is a meaningful word in this country, the concept it carries must include the right to act as our own defender when we are accused of criminal activity.

II

The second part of the argument deals with the question of an indigent's right to name his or her own counsel, and to have that person appointed by the Court on two conditions. These conditions are the same faced by any person of means, namely that the attorney is willing to accept the case, and secondly willing to accept the fee the Court will authorize.

In the second portion of the argument the basic thrust is as follows:

1. Under the law, Petitioner, as an indigent, is entitled to have the Court appoint counsel to represent him.

2. To be represented by counsel means that a true attorney-client relationship must exist.

3. An attorney-client relationship exists only when the client has confidence in his attorney and thus is

psychologically capable of full cooperation with that attorney.

4. If there is no attorney-client relationship, a Defendant is not in fact represented by counsel.

5. If the Court appoints an attorney for a Defendant in whom the Defendant has no confidence, said Defendant is not represented by counsel.

6. Two conditions are proper to be imposed on the selection of counsel by Petitioner, namely that any attorney selected is willing to take the case and has the time therefore, and secondly that said attorney selected by Petitioner is willing to accept the fee the Court will pay for such representation.

As can be seen from the foregoing, the basic thrust of second portion of the argument suggests that our law gives an indigent the right to have counsel appointed by the Court, but in fact there is no counsel appointed unless the Defendant has confidence in that person, for *psychologically* a Defendant lacking confidence in his or her attorney is unable to relate and open up fully in the preparation of a defense, and would be a poor witness because of this lack of confidence.

ARGUMENT

I

As lawyers and judges we often think that the answer to a legal question can be found only by bringing together many time honored and well reasoned decisions from prior cases, augmenting these with cita-

tions to various code sections, and with all being presented in wise and lengthy briefs. It is respectfully suggested that the answer to the question of whether or not we should be allowed to defend ourselves when we are charged with criminal conduct, is an answer which should be found in the simplest of logic.

Even as we have a right to vote, we have a corresponding right *not* to vote. We suggest that any lawsuit brought to force a citizen of the United States into the polling place would be summarily dismissed. By analogy, when our Constitution gives us the right "to assistance of counsel" doesn't it also give us the right to reject counsel and protect and defend ourselves? We believe the answer to this question must be yes, unless we wish to cut into our freedoms even more. If the right to counsel does not carry with it the equal right not to have counsel, the words "right to counsel" should be changed to "*have* to have counsel"—dictatorship at its best.

The vast majority of cases raising the question presented in this case arise from guilty verdicts where the Defendant was represented by counsel. Could these Defendants have fared worse had they been allowed to defend themselves? We suggest not, and that in fact the only change with a *pro se* appearance, might have been to the advantage of the Defendant—an acquittal. We will never know if those Defendants who were acquitted when represented by counsel would have had the same result had they appeared *pro se*.

Too often we lawyers are blinded by our own ego, suggesting that victory comes because of the "bril-

liant work of the attorney". Perhaps we should analyze the drive of some of us who urge that Defendants must be represented by attorneys. More and more we see publications urging individuals to represent themselves in Court so as save legal costs, and more and more we see the citizens of this country going into Court unrepresented in civil actions. Are we attorneys afraid of the dollar loss?—Are we convinced it is a word game, and only lawyers can play such games?—And finally, does "concern for the Defendant receiving a fair trial" mean that every case must end in acquittal? A criminal trial should not be a word game, it should not be conducted so that a lawyer can make money, and a fair trial doesn't necessarily mean acquittal. If it is argued that the rules for the conduct of a trial are too complex for the laymen to understand, perhaps we should be looking to simplify the rules rather than to force an alleged expert on the Defendant who wishes to appear *pro se*.

Often as we read decisions where the Court struggled with Constitutional issues, we find the question coming up as to what the framers of that Constitution meant. We suggest that a healthy view of the Constitution indicates it to be a document outlining a logical approach to our inter-personal relationships. But to look back and try to determine what some human beings of years and years ago meant when they wrote that document seems to make little sense. We constantly tell ourselves that we are brighter than those who have gone before, and more intelligent because we have learned much more about ourselves,

our world, and our universe. (Such a position is highly debatable when we look around at the condition of life today on this little spaceship we call Earth.) If we are more intelligent, shouldn't the proper question be, how shall we interpret the Constitution for the needs of today's society? If so, logic would seem to indicate that members of the more intelligent society, in order to protect their freedom, should more readily interpret the Constitutional right to counsel as carrying with it the Constitutional right not to have counsel?

If the Constitutional guarantee of a right to assistance of counsel means that a Defendant must be so represented, it can clearly lead to a Catch-22 situation. The Court tells the indigent you must have an attorney and then proceeds to appoint one, following which the attorney, after fully investigating the entire situation, advises the Defendant that the best chance of acquittal comes by appearing *pro se*. Now the "assistance of counsel" recommending a *pro se* appearance bumps squarely against the Court's demand that the Defendant be represented. Such a situation might well have arisen in the instant case if the Public Defender appointed had given such advice to the Petitioner after the Court terminated what the Judge called "that privilege" to appear *pro se*. We suggest that this Catch-22 situation is eliminated by deciding that an appearance *pro se* is not a "privilege", but is in fact a Constitutionally guaranteed right.

The decisions involving the question of a Defendant's waiving the right to be represented by counsel

often speak in terms of that Defendant making "an intelligent and knowing waiver" of the right, or speak of the Defendant "knowing what he is doing". Such a determination simply keeps control in the hands of government, and again chips away at the freedoms we cherish. One Judge sitting in one courtroom can force legal representation on unwilling Defendants. We speak of the right of Appeal, but how can any Appellate Court make an intelligent determination of the Defendant's ability to appear *pro se* when the sole basis for making that judgment rests on words written on pieces of paper? If an individual Judge can spread a few words on the record and thus deprive a Defendant of appearing *pro se,* it is to place immense power in the hands of one of our employees, and we must never forget that every member of the Judicial, Executive, and Legislative branches of our government are employees of we the people. Employees should not take away employers freedoms and rights, including the right to appear *pro se.* Even as society cannot force us into the hands of a doctor when we fall and break a leg, society should not be allowed to force us into the hands of an attorney when that same society is seeking to take away our liberty by imprisonment.

It is a tough question to determine when one is so mentally deranged that they cannot comprehend what is going on around them and thus should be represented by counsel. If such a situation exists, it should undoubtedly be counsel's responsibility to see that there is no trial.

This Amicus respectfully suggests that only when there is overwhelming evidence of such mental derangement should a Defendant's right to appear *pro se* be taken away. It is the Defendant who will be imprisoned, and the Defendant should have the right to take his or her chance of staying out of prison by appearing without counsel.

II

This second portion of the argument urges that an indigent Defendant is entitled to select his or her own counsel to be appointed by the Court. Certainly there should be the two conditions that the attorney so selected be willing to take the case and be available, and secondly that such counsel be willing to accept the fee to be paid by the Court. In this portion of the brief we will be speaking of the "right to counsel", but by using such terms we are speaking of the situation in which the Defendant has decided in favor of representation.

The basic thrust of the argument goes to the question of whether or not counsel selected *solely* by the Court and in whom the Defendant has no confidence, is in fact "appointment of counsel".

The American Bar Association discusses the delicate nature of the relationship between attorney-client in its "Project on Standards for Criminal Justice-Standards Relating to the Prosecution Function and the Defense Function". This project had United States Supreme Court Chief Justice Warren E. Bur-

ger as its chairman from August, 1968, until August, 1969. In its draft proposal which has now been made final, the project report says:

> "Nothing is more fundamental to the lawyer-client relationship than the establishment of trust and *confidence*. Without it, the client may withhold important evidence that might have been obtained, that valuable defenses are neglected and, perhaps most significantly, the lawyer is not forwarned of evidence which will be presented by the prosecution. It is to encourage candor and full disclosures that the obligation of confidentiality which surrounds the lawyer-client relation has been erected." (Emphasis added). (Project draft, p. 201).

At another point, it is stated:

> "At whatever stage a lawyer is called into a criminal case, he encounters problems unlike those of his counterpart in an ordinary civil case. Like a person who has been struck down in the street by a hit-and-run car, the person who is suddenly arrested or indicted may have 'shock' reactions which block communication with those who are trying to aid him. The inexperienced, illiterate or unsophisticated defendant may be unable to grasp the nature of his predicament or the relevance of certain facts which he ought to relate to his lawyer. In addition, there are often psychological barriers to revealing information essential to the conduct of an effective defense. The accused may be frightened and apprehensive or hostile and uncooperative. Even with sophisticated clients these barriers exist. The lawyer must recognize these

problems and deal patiently and persistently with them.

This is often true even where an affluent and sophisticated person selects his own lawyer and is even more true when the accused must depend upon counsel selected for him either by the Court or within the operation of a public defender system. At some levels, an accused tends to view with suspicion any lawyer whose services are provided by the Court or public defender office; he may view such a lawyer as part of the official structure and not as an advocate of his cause." (Emphasis added). (Project Report p. 197).

The State Bar of California through its Committee on Continuing Education of the Bar has pointed to the same problem of lack of representation when there is lack of communication. In C.E.B. book "California Criminal Law Practice", we find the attorney being advised, *"if you are unable to communicate with him (the defendant), you will be unable to represent him properly."* (p. 110) (Emphasis added).

In a recent decision from the California Supreme Court (*Magee v. Superior Court,* 8 Cal.3d 949) the Court dealt with the question of a client's confidence in his counsel. In that case the Trial Judge had based his refusal to allow the association of Mr. Ramsay Clark, former United States Attorney General, on the grounds that Mr. Clark was not personally known to the Court, did not enjoy the Court's personal confidence, and was not known by the Court to be qualified. The Supreme Court of California said that such a position could not be justified, stating:

> "Whether or not the court is personally acquainted with the attorney to be associated, or whether or not that attorney enjoys the confidence of the court, are considerations wholly irrelevant to the constitutional issues confronting the trial court. *It is the defendant's confidence which is at stake, not that of the court.* The proper concern of the court is, in terms of the principle expressed in *Crovedi,* whether the defendant's desire to be represented by a particular retained attorney should be made to yield because it 'will result . . . in a disruption of the orderly processes of justice unreasonable under the circumstances of the particular case.'" (*Crovedi* in the quotation refers to *People v. Crovedi,* 65 Cal. 2d 199). (Emphasis added).

Thus, the Courts, the American Bar Association, and the State Bar of California have all emphasized the need to have a true attorney-client relationship where communication can occur unimpeded between the attorney and the client.

Attached as exhibits to this brief are the declarations under penalty of perjury of three outstanding psychiatrists, Dr. Thomas Gonda, head of Stanford Hospital, Stanford University, California; Dr. Harvey Pirofsky, Professor of Psychiatry of Stanford Medical School and for many years on the staff of Agnews State Hospital, California; and Dr. Phillip Shapiro an outstanding psychiatrist practicing privately in San Francisco, California. These clearly establish that from a factual standpoint, the indigent Defendant will be unable to communicate with an attorney in whom he or she has no confidence, and that

the only way to secure this confidence is to allow the indigent to select his or her own counsel.

The next question is one of the Equal Protection of the Law as established by the Constitution. We know that the non-indigent can retain any lawyer desired under two conditions: (1) the attorney must be willing to take the case; and (2) the fee arrangement must be satisfactory to both attorney and client. For equal protection, we respectfully suggest that the indigent should have the same right. He should be able to select any attorney desired, as long as the attorney is willing to take the case and is willing to accept the fee to be paid by the government. In the case of *Griffen v. Illinois* (1955) 351 U.S. 12, the Court said:

> "Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, 'stand equal before the bar of justice in every American Court'."

The California Supreme Court in the case of *In Re Williams,* 1 Cal.3d 168, faced the question of a public defender not being knowledgeable as to the law and failing to advise the client with regard to a particular defense. The Court cited the Sixth Amendment and the Fourteenth Amendment of the United States Constitution to establish that the accused is entitled to counsel and then went on to say:

> "The logical corollary of this right is the right of indigents to have *effective* counsel appointed by the Court at state expense." (Emphasis added) (p. 174).

Recognition of the fact that counsel vary in their abilities is to recognize the simple fact of life that in any profession or occupation the abilities of those individuals who engage in the same do vary. Nothing guarantees to the wealthy Defendant that the counsel he or she selects will be the most competent, but under our system the fact of wealth does give that individual the right to select any counsel so desired, again assuming that the selected attorney will accept the case and the fee arrangement can be worked out. Again, to have the effective protection of the Equal Protection Clause of our Constitution, the indigent should have the same right. Nothing will guarantee to the indigent that his or her selection will be the most competent and effective counsel, but at least the indigent will then be on par with the wealthy, and most certainly will come closer to the ideal situation in which the client has confidence in the attorney, and thus can best relate to that attorney and properly prepare his or her defense.

CONCLUSION

In conclusion, this Amicus respectfully suggests, in paraphrasing the previously cited statement of Ruchell Magee, if we are to put a Defendant on a train which could lead to imprisonment, the Defendant should at least be allowed to be his or her own engineer. In other words, we urge this Court to uphold the right of a Defendant to the assistance of counsel, *and* the corollary right of appearing *pro se*.

We further urge the Court to consider the right of an indigent to select his or her own counsel. If there is question as to the psychological effect of having counsel in whom a Defendant has no confidence, we urge the Court to direct that a hearing be held so that medical evidence may be introduced, evidence which we believe will lead to the singular conclusion that counsel in whom a Defendant has no confidence means no counsel at all.

Respectfully submitted this 1st day of August, 1974.

JOHN E. THORNE,
Appearing Amicus Curiae.

(Exhibits Follow)

Exhibit A

David Johnson
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In Propria Persona

Louis N. Talamantez
A93537
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phone: (415) 454-1460
In Propria Persona

In the Superior Court of the State of California
In and For the County of Marin

No. 4094

The People of the State of California,
Plaintiff,

vs.

Stephen Mitchell Bingham, Hugo A. Pinell, John L. Spain, Louis N. Talamantez, Fleeta Drumco, David Johnson and Willie Tate,
Defendants.

DECLARATION UNDER PENALTY OF PERJURY OF DR. THOMAS A. GONDA

The undersigned hereby declares under penalty of perjury the following to be true:

Based on the following assumed facts, I will state an opinion. The assumed facts are as follows:

1) That an individual is charged with a violation of the Criminal Law of the State of California, and that conviction of such violation could carry as a penalty life imprisonment and/or the death penalty.

2) The person charged as a defendant is indigent and unable to hire an attorney of his or her choice.

3) The court appoints an attorney to represent the person charged, the attorney being selected by the court, not by the person charged, and over the objection of the person charged.

4) The person charged talks with the court appointed attorney and finds that he has no confidence in that attorney.

5) Assume also that the person charged has an attorney in whom he has confidence, and whom he would like appointed to represent him, and assume further that the attorney is willing to represent the individual if appointed to represent the person charged.

Based upon the foregoing assumed facts, the undersigned states that in his opinion the person charged could not in fact be represented by the Court appointed attorney who was selected over the objection of the person charged because the person charged could not enter into a true attorney-client relationship with that attorney. In my opinion, he very probably would be unable to have the necessary confidence in the attorney so as to deal openly and communicate

fully in the preparation of his defense, and further the person charged would be unable to be a good witness on the witness stand under questioning by such attorney because of a lack of confidence and the lack of the true attorney-client relationship.

Further, in my opinion, the way a true attorney-client relationship is very likely to be developed so that a person charged with a crime can have the necessary confidence so as to deal with the attorney and properly prepare any defense available to the person charged and so that said person can be a good witness for himself, the person charged must be able to select the attorney of his choice. By making such selection, the person charged with a crime can have confidence in the attorney, and rely upon the attorney to protect the interests of the person charged, and thus can psychiatrically and psychologically have the relationship required for an adequate and proper defense before a court or jury on charges brought against such person.

Attached hereto and incorporated herein by reference is factual material concerning the medical training, licensing, and specialization of the undersigned.

I hereby declare under penalty of perjury that the above is true, save and except those matters stated on information and belief and as to said matters, I believe them to be true.

Dated this 10th day of February, 1972.

/s/ Thomas A. Gonda

Thomas A. Gonda

Exhibit B

David Johnson
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In Propria Persona

Louis N. Talamantez
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phone: (415) 454-1460
In Propria Persona

In the Superior Court of the State of California
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The People of the State of California,
Plaintiff,

vs.

Stephen Mitchell Bingham, Hugo A. Pinell, John L. Spain, Louis N. Talamantez, Fleeta Drumco, David Johnson and Willie Tate,
Defendants.

DECLARATION UNDER PENALTY OF PERJURY OF DR. HARVEY PIROFSKY

The undersigned hereby declares under penalty of perjury the following to be true:

Based on the following assumed facts, I will state an opinion. The assumed facts are as follows:

1) That an individual is charged with a violation of the Criminal Law of the State of California, and that conviction of such violation could carry as a penalty life imprisonment and/or the death penalty.

2) The person charged as a defendant is indigent and unable to hire an attorney of his or her choice.

3) The court appoints an attorney to represent the person charged, the attorney being selected by the court, not by the person charged, and over the objection of the person charged.

4) The person charged talks with the court appointed attorney and finds that he has no confidence in that attorney.

5) Assume also that the person charged has an attorney in whom he has confidence, and whom he would like appointed to represent him, and assume further that the attorney is willing to represent the individual if appointed to represent the person charged.

Based upon the foregoing assumed facts, the undersigned states that in his opinion the person charged could not in fact be represented by the court appointed attorney who was selected over the objection of the person charged because the person charged could not enter into a true attorney-client relationship with that attorney. In my opinion, he would be unable to have the necessary confidence in the attorney so as to deal openly and communicate fully in the preparation of his defense, and further the person charged would be unable to be a good witness on the

witness stand under questioning by such attorney because of a lack of confidence and the lack of the true attorney-client relationship.

Further, in my opinion, the only way a true attorney-client relationship can be developed so that a person charged with a crime can have the necessary confidence so as to deal with the attorney and properly prepare any defense available to the person charged and so that said person can be a good witness for himself, the person charged must be able to select the attorney of his choice. By making such selection, the person charged with a crime can have confidence in the attorney, and rely upon the attorney to protect the interests of the person charged, and thus can psychiatrically and psychologically have the relationship required for an adequate and proper defense before a court or jury on charges brought against such person.

Attached hereto and incorporated herein by reference is factual material concerning the medical training, licensing, and specialization of the undersigned.

I hereby declare under penalty of perjury that the above is true, save and except those matters stated on information and belief and as to said matters, I believe them to be true.

Dated this 30th day of December, 1971.

/s/ Dr. Harvey Pirofsky
Dr. Harvey Pirofsky

Exhibit C

David Johnson
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In the Superior Court of the State of California
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No. 4094

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Plaintiff,

vs.

Stephen Mitchell Bingham, Hugo A. Pinell, John L. Spain, Louis N. Talamantez, Fleeta Drumco, David Johnson and Willie Tate,
Defendants.

DECLARATION UNDER PENALTY OF PERJURY OF DR. PHILLIP SHAPIRO

The undersigned hereby declares under penalty of perjury the following to be true:

Based on the following assumed facts, I will state an opinion. The assumed facts are as follows:

1) That an individual is charged with a violation of the Criminal Law of the State of California, and that conviction of such violation could carry as a penalty life imprisonment and/or the death penalty.

2) The person charged as a defendant is indigent and unable to hire an attorney of his or her choice.

3) The court appoints an attorney to represent the person charged, the attorney being selected by the court, not by the person charged, and over the objection of the person charged.

4) The person charged talks with the court appointed attorney and finds that he has no confidence in that attorney.

5) Assume also that the person charged has an attorney in whom he has confidence, and whom he would like appointed to represent him, and assume further that the attorney is willing to represent the individual if appointed to represent the person charged.

Based upon the foregoing assumed facts, the undersigned states that in his opinion the person charged could not in fact be represented by the court appointed attorney who was selected over the objection of the person charged because the person charged could not enter into a true attorney-client relationship with that attorney. In my opinion, he would be unable to have the necessary confidence in the attorney so as to deal openly and communicate fully in the

preparation of his defense, and further the person charged would be unable to be a good witness on the witness stand under questioning by such attorney because of a lack of confidence and the lack of the true attorney-client relationship.

Further, in my opinion, the only way a true attorney-client relationship can be developed so that a person charged with a crime can have the necessary confidence so as to deal with the attorney and properly prepare any defense available to the person charged and so that said person can be a good witness for himself, the person charged must be able to select the attorney of his choice. By making such selection, the person charged with a crime can have confidence in the attorney, and rely upon the attorney to protect the interests of the person charged, and thus can pyschiatrically and psychologically have the relationship required for an adequate and proper defense before a court or jury on charges brought against such person.

Attached hereto and incorporated herein by reference is factual material concerning the medical training, licensing, and specialization of the undersigned.

I hereby declare under penalty of perjury that the above is true, save and except those matters stated on information and belief and as to said matters, I believe them to be true.

Dated this 14th day of February, 1972.

/s/ Phillip Shapiro, M.D.
Phillip Shapiro, M.D.